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IN THE

Supreme Court of the United States

October Term, 1958. No. 308.

AMY C. MELLOTT, PAUL C. MELLOTT and FORREST R MELLOTT, a minor, and KAY VIRGINIA MELLOTT, a minor, by their guardian, The Valley National Bank of Chambersburg,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF PETITIONERS.

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The purpose of this Reply Brief is to point out a tactic of argument which was old when Aristotle wrote of rhetoric and hoary when Schopenhauer discussed the art of controversy—the idea being to win the argument, and not to ascertain the truth, by bringing in irrelevant matters.

I refer to the insidious footnote on page 7 of respondent's Brief stating that in Pennsylvania administrators may not

carry on a business. That is a "general rule", as Mr. Justice (later Chief Justice) Kephart wrote in *Nagle's Estate*, 305 Pa. 36, 156 A. 309, and was applied to a taproom partnership; *Spivak v. Bronstein*, 367 Pa. 70, 79 A. 2d 205; but when Herman Mellott crashed to his death intestate this strip mine operator and road contractor left behind him mountains torn apart in Pennsylvania and West Virginia, contracts part performed, all under performance bonds and under bonds to "back-fill" the landscape. Over the terrain were scattered bull-dozers, drag lines, shovels, and the like, appraised for $579,901.44; uncovered coal valued at $37,554.52 —and he was overdrawn in his bank account ($56,405.16).

The administrators did not enter any bids on new contracts. They concluded business initiated by the decedent. The administrators **had no choice.**

It seems snide to inject such irrelevant argument into a very simple question: What does "*shall be computed*" mean?

It is plain and mandatory that the income **of the estate**—required to be included in the income of the heirs—be correctly computed.

This question is of tremendous importance to all estates. It seems to be of **more general interest** than the extremely rare gift of single premium life insurance policies: *Fidelity-Philadelphia Trust Co. v. Smith, Collector*, 356 U. S. 274.

Finally, for a Court to ignore the mandatory "*shall be*" of Congress—without holding the "*shall be*" to be unconstitutional—is the **worst** kind of judicial legislation; the **best** kind being the enactment of an improvement in the law.

Respectfully submitted,

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